ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, JUDGE

DIVISION IV

CA06-862

DELORIS ANN LENZ
APPELLANT

V.

ARKANSAS DEPARTMENT OF HEALTH & HUMAN SERVICES, PAM OLIVAS, THOMAS JAMES NIMON, AND MINOR CHILD
APPELLEES

APRIL 4, 2007

APPEAL FROM THE CLEBURNE COUNTY CIRCUIT COURT
[NO. JV-2004-20]

HON. STEPHEN CHOATE, JUDGE

AFFIRMED

This appeal arises from an April 27, 2006 order of the Cleburne County Circuit Court denying a motion to intervene and a petition for guardianship by appellant Deloris Ann Lenz. The motion and petition were filed after a Department of Health and Human Services (DHHS) case moved toward termination of the parental rights of Pam Olivas, daughter of Mrs. Lenz, with regard to Olivas's son D.R., who is Mrs. Lenz's grandchild. Mrs. Lenz contends on appeal that the trial court's order was an abuse of discretion. D.R.'s attorney ad litem responds that appellant lacks standing to appeal from the order denying her petition for guardianship because she did not appeal the denial of her motion to intervene. DHHS responds that, because the motion to intervene was not timely, the trial court's denial of the

motion to intervene was not an abuse of discretion; additionally, DHHS responds that the trial court correctly denied the guardianship petition. We affirm the denial of Mrs. Lenz's guardianship petition and motion to intervene.[1]

Six-and-a-half-year-old D.R. was taken into emergency custody by DHHS on January 21, 2004 because his mother was not providing him adequate supervision and had tested positive for drugs. He was adjudicated dependent-neglected the following month; because of disruptive behaviors, he was put into a therapeutic foster-care program that included inpatient treatment, alternative school services, and placement with a foster parent. The goal of the case was reunification of the child and his mother, and DHHS provided services such as individual and family counseling, medical and dental services, child welfare services, transportation, money assistance for visitation, and acute care.

At a review hearing on October 17, 2005, after case workers reported that Olivas was not taking court-ordered drug tests at specific times, the goal of the DHHS case was changed to adoption. The resultant review order, entered on November 7, 2005, set forth the court's finding that DHHS had made reasonable efforts to provide services, that Olivas had not complied with the case plan, and that the putative father of D.R. had not had any involvement in the plan. The review order recited that the case goal was changed to adoption, and a date

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[1]The trial court's order of April 27, 2006 states that "the Motion to Intervene and Petition for Guardianship filed by Deloris and George Lentz [sic] is denied and not granted." The motion to intervene and petition for guardianship identify only Mrs. Lenz as a party and make no mention of Mr. Lenz. We need not resolve these discrepancies because Mrs. Lenz alone appeals the court's decision.

of December 14, 2005 was set for a termination-of-parental-rights and permanency-planning hearing.

Mrs. Lenz filed the motion to intervene and the petition for guardianship on November 8, 2005. A basis of each was that she had on numerous occasions physically cared for D.R. and had assisted him and her daughter by providing clothing, food, and housing.

At a proceeding on December 14, 2005, Mrs. Lenz and her husband informed the court that Ms. Olivas had consented to the guardianship petition. DHHS stated its position that Mrs. Lenz was not an appropriate care giver and, even if she were, had waited too late to come forward. The Lenzes responded that they had acted within two weeks of learning of the likelihood that D.R. would not be reunited with his mother, and they asserted that placement with a blood relative would be best for him. The child's attorney ad litem did not oppose the intervention but did oppose the guardianship. The court orally denied the intervention, scheduled a guardianship hearing, and continued the previously scheduled hearing for termination of parental rights.

Evidence before the trial court at a hearing on March 6, 2006 included a home study of the Lenz residence; medical and psychological assessments of Mr. and Mrs. Lenz; a DHHS court report; a CASA report; and testimony by the Lenzes, D.R., DHHS caseworker Susan Morrow, Betty Wieghmink of CASA (Court Appointed Special Advocates), and D.R.'s case manager, Davonya Montgomery. The court took the guardianship under

advisement and, in its subsequent order of April 27, 2006, denied both the motion to intervene and the petition for guardianship.

The case proceeded to a termination hearing on May 9, 2006, and on May 23, 2006 the trial court entered a written order terminating Ms. Olivas's parental rights. The order included the court's finding that it would be detrimental to the health and well-being of D.R. to be returned to the custody of his mother or to seek alternate permanency other than termination of parental rights.

On appeal Mrs. Lenz alleges that the trial court abused its discretion in its order of April 27, 2006. She presents two primary arguments: 1) because there was a viable, less restrictive alternative to termination and because it was in D.R.'s best interest to be placed in the care of his grandparents, the court abused its discretion in denying her petition for guardianship, denying her motion to intervene in the termination hearing, and in allowing DHHS to proceed with the termination hearing; and 2) the court abused its discretion when it denied the petition for guardianship without a finding of the standard of proof by which it measured the facts and denied the petition. We do not address the second argument, for Mrs. Lenz cites no authority that the trial court was required to present the standard of proof. *See Todd v. Arkansas Dep't of Human Servs.*, 85 Ark. App. 174, 151 S.W.3d 315 (2004) (holding that, when a party fails to cite any authority or convincing argument on an issue, and the result is not apparent without further research, the appellate court will not address the issue). As a preliminary matter, we must discuss the notice of appeal in this case. It

states in pertinent part, "The Intervenor, Deloris Ann Lenz, appeals from the Review Order [of April 27, 2006], denying her request for guardianship. . . . The Intervenor designates the entire record on appeal." The guardian ad litem asserts that Mrs. Lenz lacks standing to appeal from the order denying her guardianship petition because she did not appeal the denial of her motion to intervene. The guardian ad litem maintains that Mrs. Lenz's reference to herself as intervenor does not make her a party.

Rule of Appellate Procedure-Civil 3(e) requires that a notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, decree, order or part thereof appealed from; and shall designate the contents of the record on appeal. Party status is generally obtained by initiating an action through filing a complaint or responding to a complaint by answer. *In re $3,166,199*, 337 Ark. 74, 987 S.W.2d 663 (1999).

We hold that Mrs. Lenz had standing to appeal the guardianship determination against her. Her motion to intervene and the petition for guardianship were separate matters, and her filing of the guardianship petition gave her party standing for purposes of appealing the denial of that petition. Her notice of appeal specified that she was the appellant, and it is of no consequence that she additionally designated herself as "intervenor." The notice clearly designated the trial court's written order of April 27, 2006, which memorialized the denials of the motion to intervene and the petition for guardianship, and it was not necessary that the notice refer to the oral denial of her intervention motion at the December 2005 proceeding.

The Petition for Guardianship and Decision to Proceed with Termination

Guardianship proceedings are reviewed *de novo*, but the appellate courts will not reverse a guardianship decision unless it is clearly erroneous, taking into consideration the trial court's superior position to weigh and assess the credibility of the witnesses and their testimony. *Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000). Three things must be proven before a guardian may be appointed: the person for whom guardianship is sought is a minor or otherwise incapacitated, a guardianship is desirable to protect the needs of that person, and the person to be appointed guardian is qualified and suitable to act as such. *Id.* Where the incapacitated person is a minor, the key factor in determining guardianship is the best interest of the child, and any inclination to appoint a parent or relative must be subservient to the principle that the child's interest is of paramount consideration. *Id.*

Mrs. Lenz asserts that termination of D.R.'s relationship with his grandparents could not serve his best interests and that DHHS violated public policy of preferring relative placement over termination of a child's connection to his entire family. Mrs. Lenz complains that DHHS did not inquire whether the Lenzes were a possible placement for D.R. but accepted the word of Ms. Olivas, later deemed to be an unfit parent, who declined to name them as possible temporary custodians. Mrs. Lenz points out that she went to all the hearings in her home county regarding D.R. but missed others because they were in another county.

Mrs. Lenz notes her own testimony that D.R. spent most of his time with his grandparents as well as his mother before being taken into DHHS custody, that the Lenzes had a loving relationship with him and had the income to care for him, and that it was not

until they hired an attorney that DHHS negotiated supervised visitation for them on a weekly basis. Mrs. Lenz notes that she was not able to volunteer to take custody of D.R. at first because she was recuperating from back surgery. She points to the Lenzes' testimony that they were not able to see D.R. after he went into foster care except when they set up, at considerable expense, a separate residence on their property for his mother to have visits with him in the summer and to comply with the case-plan requirements. She notes that they denied "covering up" for Olivas, that they asserted that they helped her comply with the case plan, and that, although they suspected she was using drugs, they never saw such behavior.

We note that, in addition to the testimony that Mrs. Lenz relies upon, there was evidence before the trial court that the Lenzes had three grown daughters but did not know the whereabouts of two of them, including D.R.'s mother; that the Lenzes had been involved with DHHS when D.R.'s mother, at age fourteen, was removed from their home after accusing Mr. Lenz of sexually abusing her; and that the home study of the Lenzes' residence reported a "dark and dingy appearance" indicating that heavy smokers were living there, while Mrs. Lenz attributed the smoke residue to wood heat. Mrs. Lenz testified that she and Mr. Lenz did not know "exactly how bad" D.R.'s problems were but knew that he had problems with authority, that he was not good at following directions or following through, and that he had temper outbursts. She stated, "I don't think [D.R.] will be able to quit counseling just because he comes home, but eventually, he might not need it anymore."

At the conclusion of the hearing, the trial court noted that D.R. had severe problems before ever coming into foster care. The court commented that the Lenzes had not been cooperative with DHHS, had been "super protective" of D.R.'s mother, had "not entered the picture" for his protection, and had waited until the eleventh hour to ask for guardianship. The court stated:

> I'm concerned with, as pointed out in the home study, but as pointed out also by Mrs. Lenz's testimony, the [Lenzes'] true understandings of the problems that D.R. has. I would hope that love and family would solve the problems.
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> I don't think you'd get rid of Mom. I think as soon- if I were to grant guardianship, Mom's gonna be knocking on the door.

The court's subsequent denial of the motion to intervene and petition for guardianship, set forth in its order of April 27, 2006, was based on a written finding "that the grandparents do not truly understand [D.R.'s] problems and the court questions their ability to properly care for him." The court determined that it was in the best interest of D.R. that the goal of the case should be termination of parental rights and a goal of adoption. In light of the evidence presented, we cannot say that the court clearly erred.

We will not address Mrs. Lenz's additional argument that a child has federal and state constitutional rights to be placed with appropriate family members. Even in a case involving termination of parental rights where constitutional issues are argued, we will not consider arguments made for the first time on appeal. *Myers v. Arkansas Dep't of Human Servs.*, 91 Ark. App. 53, 208 S.W.3d 241 (2005).

The Motion to Intervene

Mrs. Lenz contends that she qualified for intervention under Arkansas Rule of Civil Procedure 24,which reads in pertinent part:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
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> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . when an applicant's claim or defense and the main action have a question of law or fact in common.

Mrs. Lenz claims that she qualified for intervention of right and for permissive intervention. She asserts that she had a recognized interest in the subject matter of the termination litigation because of an ongoing familial relationship with the child, her interest might be impaired by the outcome of the litigation if her daughter's rights were terminated, and her interest was not adequately represented by the existing parties because she was not allowed to speak on her own behalf at hearings and had no counsel prior to filing her petition for guardianship. She also asserts that her claim for guardianship and the main action for termination proceedings had common questions of both law and fact, being the fate of the child and her relationship with him. She argues that her motion to intervene was timely under the circumstances of this case.

A threshold question in determining whether intervention should be allowed under Rule 24 is whether the application to intervene was made in a timely manner. *Employers Nat'l Ins. Co. v. Grantors to Diaz Refinery PRP Committee Site Trust*, 313 Ark. 645, 855

S.W.2d 937 (1993). The trial court's decision as to the timeliness of intervention is a matter within the court's sound discretion and is subject to reversal only where that discretion has been abused. *Id.* Factors to be considered in a decision on timeliness are how far the proceedings have progressed, any prejudice to other parties caused by the delay, and the reason for the delay. *Cupples Farms Partnership v. Forrest City Prod. Credit Ass'n*, 310 Ark. 597, 839 S.W.2d 187 (1992).

Here, Mrs. Lenz waited almost two years after D.R. was taken into DHHS custody to become involved in these proceedings, and the trial court noted that the grandparents had not stepped in to protect D.R. even before he was taken from his mother's custody. The trial court acted within its discretion in denying Mrs. Lenz's motion to intervene.

Affirmed.

GLADWIN and VAUGHT, JJ., agree.